IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1047 OF 2005

Praful Kisan Wadkar .. Appellant

Versus

Shashikant Vishnu Gotwade .. Respondent

Mr.S.M.Gorwadkar for appellant

None for respondent

CORAM : P.V.KAKADE, J.

DATE : 28TH SEPTEMBER,2005.

P.C.:

1. This is an appeal preferred against the judgment and order passed by Addl. District Judge, Raigad Alibag dated 4.3.2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division Alibag dated 30.11.2001 partly decreeing the suit with direction that the appellant-defendant should hand over vacant

possession of the suit premises to the plaintiff within particular time and consequential reliefs of payment of damages.

2. I have heard the learned counsel for the appellant. None appears for the respondent. Perused the record.

3. The plaintiff-respondent filed the suit against the defendant alleging that he owned and possessed the property bearing number with Survey No.49 Gat No.25 Hissa No.6B area 0-2-24 Rs 13.84 NB at Roha, District Raigad. The municipal house no.772 consisting of two galas is owned by him. Out of these two galas, one gala towards western side admeasuring 21 ft x 12 ft is subject matter of the suit. The suit gala towards western side is in possession of the plaintiff himself and he is running his cycle shop in the said Gala. In the month of December, 1991 the plaintiff considering the friendly relations with the defendant had given suit gala to the defendant temporarily for six months without any consideration, by oral permission. At the time of construction of the said gala the defendant had

provided financial aid to the plaintiff by paying Rs.30,000/= and hence plaintiff permitted to the defendant to use the said gala and it was agreed that the plaintiff should keep said amount as a deposit and when the defendant will vacate the said gala, it would be returned. The permission granted to the defendant was over in the month of May 1991, and therefore, the plaintiff asked the defendant to vacate the gala and take return his deposit but plaintiff avoided to give the possession. The plaintiff issued a notice to the defendant seeking possession along with damages. The defendant contested the suit, inter alia, submitting that he was tenant in the suit property and used to pay rent regularly and as such the suit was not tenable in law and sought to be dismissed.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the defendant had failed to prove that he took suit premises on executing agreement for 11 months and by paying Rs.30,000/= to the plaintiff. It was also held that the plaintiff was entitled to seek possession and damages and the suit came to be

decreed. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties and on the basis of available evidence concurred with the findings recorded by the trial court and dismissed the appeal. Hence the present appeal.

4. At the outset it may be noted that the only question involved in this appeal is the nature of relationship between the parties, according to the plaintiff, the defendant is a gratituous licensee in the suit premises and his license was duly terminated and he is entitled to the reliefs claimed in the suit. The defendant has come with the case that he is tenant in the premises and therefore, he is protected under the Bombay Rent Act and hence the suit is not tenable in law. In this regard, the learned counsel for the appellant sought to put reliance on the ruling of the Supreme Court in the case of **C.M.Beena and Anr. vs. P.N.Ramchandra Rao reported in 2004(3) SCC 595** wherein the apex court had occasioned to laid down the test to determine such relationship. It was observed that "real intention of the parties to be deciphered from

complete reading of document if any,and surrounding circumstances, including conduct of parties before and after creating of the relationship. Retention of control or possession over the property decisive factor. It was further observed that generally speaking, the deference between a "lease" and "license" is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and abut for the permission so given the occupation would have been unlawful." The learned counsel also brought to my notice the set of facts involved in the case before the Apex Court and submitted that the set of facts involved in the present case are also similar in nature. However, in this regard, it must be noted

that there cannot be two opinions with regard to the ratio laid down by the Apex Court in the said ruling, however, in my considered view, that does not applicable to the present case. It was urged on behalf of the appellant that the decisive factor would be elements of control over the suit premises of the plaintiff to determine the true relationship and intention between the parties. Now, admittedly there is no document executed between the parties and we left with no option but to determine the case on the basis of surrounding circumstances revealed from the record. Evidently again, though the appellant-defendant has come with the case that he was paying rent regularly to the plaintiff, no rent receipts are either obtained or received by him, and therefore, it cannot be said that the defendant was paying any amount towards rent to the plaintiff, which again fortifies the plaintiff's case of the theory of gratituous licensee. It cannot be overlooked that the present appellant is a businessman running grocery shop in the premises and therefore, obviously he was maintaining accounts of his day to day affairs. If it was so, even for the plaintiff did not issue any receipts towards the rent

allegedly paid by the appellant, such payment would have definitely reflected in the accounts of the defendant, which have not come before the court, nor there is any explanation is coming forth for the said purpose. This is a crucial circumstances, which goes against the defendant in order to hold that the plaintiff's case that he is gratituous licensee has to be accepted.

5. So far as the element of control over the suit premises of the plaintiff is concerned, it is needless to mention that the control is a relevant term and differ from case to case because here the defendant is running grocery shop and therefore, what type of control the plaintiff was expected to apply is not clear either from the evidence or other circumstances revealed from the record. Be as it may, the fact remains that the defendant has failed to prove that he is a tenant of the suit premises.

6. In the result, I am inclined to hold that the concurrent findings recorded by both the courts below are seen to be recorded after appreciating the evidence in proper perspective. It is to be noted

that in a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. In view of this aspect, I hold that the appeal is devoid of any merits and liable to be dismissed. Hence the appeal stands dismissed.

7. At this stage the learned counsel for the appellant sought indulgence of this court seeking some time to vacate the suit premises. In view of the facts and circumstances I am inclined to grant time for vacation of the suit premises. Hence, it is directed that the appellant-defendant shall vacate the suit premises on or before 31st May 2006 on condition that the appellant-defendant shall furnish Undertaking to this Court to that effect within two weeks from the date of this order. With this direction the appeal stands disposed of with no order as to costs.

. Consequently Civil Application No.1559 of 2005 also stands disposed of with no order as to costs.